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In the Supreme Court of the United States

Nos. 143, 159 and 576
OCTOBER TERM, 1965

No. [redacted]
THE BALTIMORE AND OHIO RY. CO., et al.,
v. Appellants,
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,
Appellees.

No. [redacted] 8
CHICAGO AND NORTH WESTERN RY. CO., et al.,
v. Appellants,
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,
Appellees.

No. [redacted] 23 1
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
v. Appellants,
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., et al.,
Appellees.

On Appeal From the United States District Court for the Southern District of California

MOTION TO AFFIRM

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Montana
Nevada
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Oregon
Utah
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Intervening Plaintiffs-Appellees, State regulatory Commissions, pursuant to Rule 16 of the Revised Rules

of the Supreme Court of the United States, move that the Judgment of the District Court be affirmed on the ground that the questions raised are so unsubstantial as not to warrant further argument because the Judgment of the District Court is plainly correct.

STATEMENT

Intervening Plaintiff-Appellees are the regulatory commissions of the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington are charged by statute of their respective states with the power and duty of administering state laws regulating carriers by railroad. These regulatory commissions are further authorized by statute to appear and represent their respective States before the Interstate Commerce Commission.

The Mountain-Pacific states have experienced a tremendous population and industrial expansion in the period since World War II. In large part, however, the economy of the Mountain-Pacific States is tied to the production of agricultural commodities, forest production and products of mines which have been and for the future must be marketed in substantial volume in the Midwest and East. The economy of the Mountain-Pacific States is dependent upon the availability and enlargement of rail transportation service at realistic competitive prices. Therefore, the people of the Mountain-Pacific States are vitally concerned with the divisions orders of the Commission under review. These orders would seriously hamper the ability of the Mountain-Pacific rail-

roads to provide for the present and future transportation needs of this expanding territory.

ARGUMENT

I.

In setting aside the orders of the Commission, the district court recognized the interest of these Intervening Plaintiff Appellees and quite properly held that the Commission had failed to accord these interests the statutory protection to which they were entitled. Specifically, the court condemned the Commission's treatment of the passenger deficit issue which was central to our position and ordered the Commission to consider the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits in any proceeding upon remand. To our view, this is the most important point of the district court's decision. Yet neither the Commission nor the Midwestern railroads, who are now the only applicants in this case, even mention this part of the district court's holding. As will be shown below, this fact in itself establishes that plenary review in this case would not be warranted, for whatever view the Court might take of the other grounds for the district court's decision, the Commission's reliance upon passenger deficits would require that its orders be set aside. Hence, the district court's judgment must be affirmed.

Section 15(6) of the Interstate Commerce Act requires the Commission to consider among other standards the revenue needs of the railroads affected. In the proceedings before the Commission Intervening Plaintiff-Appellee introduced evidence showing the tremendous

need for investment in plant and equipment in order that the Mountain-Pacific railroads could provide the expanded railroad service required by the growing industry and agriculture of the West.

The basic revenue needs issue as it developed in these proceedings revolved about the need of Mountain-Pacific railroads for revenue necessary to meet their responsibility to provide adequate railway service for the people of the states they serve. The West has grown tremendously—both in population and industrially. Metallurgical industries and natural resource production of electricity, natural gas, and oil have experienced unusually high growth. An extremely important characteristic of this growth rate is that it has not been uniform, and many areas are still largely not industrialized. In other words, not only has the need for adequate railroad service been expanding, but the potential for increased development of the West in the future will call for huge additional investment by the railroads in order to keep pace and provide the necessary service.

Furthermore, the geographic location of the Mountain-Pacific states, far from all centers of population of the East and Midwest which are the country's principal markets, emphasizes the dependence of the Mountain-Pacific area on the railroads. Not only do the long distances require unusually high service levels, but it is clear that the ability of the expanding West to compete with eastern products depends in large part on the maintenance of competitive freight rates.

The West is thus in a unique position as far as its

transportation needs are concerned. During at least the last decade, Mountain-Pacific railroads increased their net investments by over a billion dollars. Yet the Mountain-Pacific area has suffered substantially from critical equipment shortages, and the earnings of the Mountain-Pacific railroads have declined.

The Commission did not challenge these facts. The Commission's report documents the greater growth of Mountain-Pacific territory (B&O J.S. 71a-72a). The report also acknowledges that the Mountain-Pacific (transcontinental) lines' income did not keep pace with their growth of traffic volume (B&O J.S. 74a-75a). The Commission's report thereafter refers to the evidence showing that, the Mountain-Pacific lines increased "their net investment in transportation property by $800 million . . . but this increase in investment produced not one penny of earnings." (B&O J.S. 87a). This showing and others like it are passed off by the Commission as resulting "from the passenger deficits of those roads" (B&O J.S. 86a-88a),

This so-called "passenger deficit" issue was not raised by the Eastern and Midwestern railroads. No claim was made at the hearings by any party that the passenger deficits of the Mountain-Pacific railroads were too high. The issue was invented by the Commission's Examiners who relied on the passenger deficit theory to reject the Mountain-Pacific lines' revenue needs evidence. The Examiners also criticized the State regulatory commissions for not taking a "sympathetic attitude" toward passenger train discontinuances (Examiners' report p. 31). The

Commission dropped the language criticizing the state commissions, but adopted the Examiners' passenger deficit theory, in the same language used by its Examiners (Compare B&O J.S. 86a-88a with Examiners' report pp. 28-31).

Using this theory, the Commission concluded that "the eastern railroads are in a less advantageous situation *as freight carriers* than those in the western district" (B&O J.S. 88a). In other words, the Commission relied upon the freight net railway operating income, as contrasted with the entire income, including the passenger deficits of the Mountain-Pacific railroads. It was on the basis of such comparisons that the Commission reached the conclusion that the divisions of the Eastern and Midwestern railroads should be increased to reflect their allegedly greater revenue need (see also B&O J.S. 141a, 143a).

This disregard of passenger deficits was one of the major reasons why the District Court set aside the Order of the Commission. In remanding the case, the District Court specifically directed the Commission to consider "the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits." (B&O J.S. 20a), This disposition of the case by the District Court was plainly correct.

Section 15(6) does not contemplate any separation of revenue needs as between freight and passenger operations. The section refes to the "'amount of revenue required" with respect to operations "in the service of transportation." With respect to revenue needs as con-

trasted with the costs of the particular traffic in issue, the statutory language covers "all transportation service." *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 360 (1936).

The Commission's action in this divisions case cannot be reconciled with its action with respect to the revenue needs of the railroads in freight rate increase cases. This Court approved the Commission's inclusion of passenger deficits in determining revenue needs in *King* v. *United States,* 344 U.S. 254 (1952). The *King* opinion includes the following (344 U.S. at 262-63):

" 'Citing with approval its similar views in *Ex Parte No. 103, Fifteen Per Cent Case,* 1931, 178 I.C.C. 539, and *Ex Parte No. 123, Fifteen Per Cent Case,* 1937-1938, 226 I.C.C. 41, the Commission summarizes its present position as follows:

> "These cases are typical of our more recent holdings upon this question. While we regard it as 'trite to say that each particular service, coach, sleeper, parlor car, and head end, should be as nearly as may be pay its own way and return a profit' (*Eastern Pasenger Fares in Catches,* 227 I.C.C. 17, 25), and we have accepted the contention that there may be traffic that should not be burdened with a shortage of passenger service return (*Livestock, Western District Rates,* 190 I.C.C. 611, 629), yet, if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations. Both

> may be subjected to reasonable rates and charges to produce the fair aggregate return, even though thereby a higher rate of return may be expected from the one than from the other. (*Property Owners' Committee* v. *Chesapeake & O. Ry. Co.*, 237 I.C.C. 549, 565.)' *Id.*, at 35. See also, *Ex Parte 87, Revenues in Western District*, 113 I.C.C. 3, 23."

"This change of policy was the inevitable consequence of steadily increasing passenger operating costs, together with the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by increasing passenger rates."

The *King* case upheld an I.C.C. order requiring an increase in intrastate freight rates. This same basis of using revenue needs from all services, including passenger service, has been used by the Interstate Commerce Commission many times to order increases in interstate freight rates in the Mountain-Pacific states. It would constitute a denial of equal justice to depart from the basis of revenue needs used to increase intrastate and interstate freight rates in order, in this divisions case, to take revenues away from the railroads serving the Mountain-Pacific states.

Whether or not the I.C.C. has the power to base its actions in rate and divisions cases on inconsistent theories of revenue needs, the Commission's action here was not supported by findings explaining the reasons or basis for its actions, in violation of Section 8(b) of the Administrative Procedure Act. The need for rational findings is especially great in a case in which the Commission

has departed from "prior forms." *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-53 (1954).

In addition to the error arising from lack of adequate findings, the Commission's reliance upon freight net railway operating income data to measure the relative needs of railroads "as freight carriers" is arbitrary and unlawful because such data do not provide a rational comparison of financial results of freight operations on different railroads. Freight net income figures do not indicate the condition of the railroad were it to discontinue passenger service. This is because freight net income figures and passenger deficits involve a substantial amount of joint expenses for the maintenance of, for example, track, roadbed, bridges, and the like, over which freight and passenger trains operate. These joint expenses, which must be incurred regardless of whether or not the railroad operates passenger service, are allocated to freight or passenger expense according to an I.C.C. formula based on the amount of each service the railroad provides. Thus, were a railroad to eliminate passenger service, the joint costs allocated to it would have to be transferred to the freight accounts, thus reducing rather than improving freight operating statistics. As this Court held in *King* v. *United States*, 344 U.S. 254, 265, (1952), "the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules." In other words, the freight and passenger portions of a railroad business are not separate and distinct operations, and the Commission's insistence on disregarding passen-

ger deficits was arbitrary action which was properly set aside by the District Court.

II.

Under its unlawful passenger deficit theory, the Commission concluded that the revenue needs of the Eastern and Midwestern lines were greater than those of the Mountain-Pacific lines, and that therefore the divisional share of the East and Midwest should be increased. Yet, even under its own theory, the Commission made no findings whatsoever as to what the revenue needs of the East and Midwest are, nor did it determine whether or not the new divisional order would compensate for those needs. This flagrant violation of the Administrative Procedure Act was a primary factor responsible for the District Court's refusal to enforce the order of the Commission. The Court concluded:

> [T]hat to comply with the provisions of the Interstate Commerce and Administrative Procedure Acts, . . . [15(6) and 8(b) respectively] findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, [and] the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent by which the new divisions prescribed will produce the revenue found to be required . . . (B&O J.S. 19a-20a).

The holding of the District Court is in complete conformity with the interpretation given the Administrative Procedure Act in this Court. In *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-68 (1962), the Court emphasized the responsibility of the Commission to set

forth explicit findings of fact and conclusions so that it is possible to determine the reasons and basis upon which the Commission's decision is predicated. The Court described the Commission's action in *Burlington* as follows:

> There are no findings and no analysis to justify the choice made, no indication of the bases on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. . . . Expert discretion is the life-blood of the administrative process, "but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can be a monster which rules with no practical limits on its discretion."

This ruling is clearly applicable to the Commission's action in the present case. As the District Court held (B&O J.S. 12a), where the issue before the Commission is the amount of revenue which a carrier should get from one part of its business in order to ensure a just contribution to its overall revenue needs, a prerequisite to a rational decision is a determination as to the amount of the overall needs and the amount of the transfer that should be made to meet those needs. To decide without knowing either what is needed or what its order will accomplish is arbitrary action in its grossest form. To act without findings from which a reviewing court may judge the reasonableness of a chosen course compounds the error. The whole purpose of the Administrative Procedure Act was to preclude just such arbitrary decisions on the part of administrative agencies.

The Jurisdictional Statement of the United States and the Interstate Commerce Commission gives the mislead-

ing impression that the question is whether the Commission must make findings for "each of the 300 railroads involved" (U.S. J.S. 2) as to "precise difference in dollars" resulting from the new divisions (U.S. J.S. 18). Even as to individual carriers this statement of the question is misleading. No question is presented by the instant case as to any requirement of findings with respect to "each of the 300 railroads involved", the district court having expressly stated that, except as to three railroads, any question as to individual consideration had been waived. (B. & O.J.S. 19a).

This is not a fair statement of the question in this case. The Commission made no finding as to the amount of revenue required by the respective *groups* of railroads, nor did it find, in any form (precise or otherwise) what effect its order would have upon the revenue needs of those *groups*. This is irrational and unlawful action condemned by the Administrative Procedure Act, quite apart from any consideration of any individual roads.

From the standpoint of these Intervening Plaintiff-Appellees, the absence of group findings is critical. As representatives of the public interest, our concern is with the whole railroad system necessary to serve our area, not at this time with the financial condition, as such of any single railroad. Of course, the West does depend upon all of its railroads, and could ill afford to lose the services of any one of them. But the basic problem raised by the Commission's orders here goes to their financial impact upon the whole Mountain-Pacific group. Because the Commission's findings as to the group are inadequate, the situation of individual railroads is irrelevant.

CONCLUSION

For the foregoing reasons, no substantial questions for the decision of the Court are presented in these appeals, and the judgment of the District Court should be affirmed without argument.

Respectfully submitted,

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